The sole argument urged in the opposing memorandum is that the petition "was filed on January 2, 1973, more than ninety days since entry of judgment by the Supreme Court of New Jersey * * *." Paragraph 6.

Petitioner contends respondent's failure to respond to the substantive points in the petition is an implied admission of their merit. Petitioner further contends that the objection of untimeliness is not well founded. Its timeliness is demonstrated below.

The memorandum invokes 28 U.S.C. sec. 2101(c) and *Rule* 22. The sub-section of the Code cited applies only to civil actions, and therefore, not to this criminal case. 28 U.S.C. sec. 2101(d) provides that in a criminal case, the time application for a Writ of Certiorari to review the judgment of a state court shall be as prescribed by rules of this court.

This court has proscribed in *Rule* 22(1).

> "A petition for Writ of Certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the Clerk within ninety days after the entry of such judgment."

The final state court decision was entered on September 25, 1972. (Both the petition and the memorandum in opposition correctly state this date.) The ninetieth day thereafter was December 24, 1972, a Sunday. The ninety-first day thereafter was December 25, 1972, a holiday. Thus, the time was automatically extended to the ninety-second day, Tuesday, December 26, 1972.

Petitioner does not have actual knowledge of the date of receipt of the petition in the Clerk's office. However, the Proof of Service on the respondent now on file indicates copies of the petition were mailed by the printer to the

Mercer County prosecutor, the attorney for respondent State of New Jersey, on Friday, December 22, 1972 at Woodbridge, New Jersey. Petitioner's attorney has been informed by the printer that, at the same time and place, 40 copies of the petition were mailed to the Clerk of this court with first class, special delivery, postage prepaid. Since Woodbridge, New Jersey is located on the main line of the former Pennsylvania Railroad, as well as on Route 1 and the New Jersey Turnpike (there being an exit in Woodbridge) we have assumed that whatever means of transportation was used by the Post Office Department, this first class, special delivery item should have arrived in the Clerk's office not later than the fourth succeeding day, the deadline of Tuesday, December 26, 1972.

Up until that time, the $100.00 filing fee had not been paid. But on that date, during the morning of Tuesday, December 26, 1972, William L. Boyan Esquire, of counsel with petitioner, made a last check whether everything necessary was being done within time. He found that rules state that the petition must be "filed" within time, but do not define the term "filed." They do not state expressly whether the docket fee must be paid to complete the filing, in the case of a petition for a Writ of Certiorari, nor state any explicit time limit for paying such a docket fee.

Rule 21(3) provides that " * * * petitioner shall file * * * 40 copies of a petition * * * and shall enter his appearance and pay the docket fee," (without specifying when these acts must be done). Literally read, this rule implies that the filing of the petition, the entry of the appearance, and the payment of the docket fee are three distinct acts.

Rule 22(2) expresses a time limit applicable to filing. It would seem to apply only to the first of the three distinct acts referred to in *Rule* 21(3).

Rather than rely on his own interpretation of the rules, however, Mr. Boyan telephoned the office of the Clerk of the court on the morning of Tuesday, December 26, 1972, to inquire whether the fee had to be paid within the time limited for the filing of the petition, that is, by the end of the same day, December 26.

(The record of the New Jersey Bell Telephone Company toll charge for the call from Mr. Boyan's office to the office of the Clerk is reproduced as Exhibit A to this brief.)

Mr. Boyan spoke to a youngish, but not immature-sounding, female whose name he did not record. He explained the situation to her and stated that if necessary to perfect the filing in time he would immediately travel to Washington and pay the $100.00 fee. Since Mr. Boyan was in Trenton, New Jersey at the time, execution of this offer was easily possible by traveling by air from Mercer County Airport on a scheduled Allegheny Airline, by rail, Trenton being a stop on many main line New York–Washington trains, or by private car.

But the person in the Clerk's office assured Mr. Boyan that the only act necessary to be done within the time limited for filing the petition was the actual delivery to the Clerk's office of the 40 copies of the petition. She stated that it would be perfectly all right to mail a check in payment of the fee, and that she would put a note with the copies of the petition delivered to the Clerk's office stating that the fee was to be received in the mail shortly.

On the same date, December 26, 1972, petitioner's counsel of record, Leon M. Robinson, Esquire, deposited in the mail in Trenton, New Jersey a first class letter enclosing a check for $100.00 drawn on the account of his firm, Teich Groh and Robinson, in payment of the docket fee.

On January 4, 1973 the Clerk dispatched a letter to Mr. Robinson, petitioner's counsel of record, notifying him that the case was docketed on January 2, 1973. Depending on whether the office of the Clerk was closed on Saturday, December 30, 1972, in observation of the New Year holidays, January 2 was either the fourth or fifth business day after dispatch of Mr. Robinson's letter with the docket fee. Assuming it took one or two days for the letter to be delivered by the post office, from two to four days remain to be accounted for. We are not sufficiently familiar with the operation of the Clerk's office to be able to do so. We do not know whether the docketing date reflects the actual date on which the personnel of the Clerk's office process the petition, or whether it is intended to reflect the date when last necessary instrument was received, even if not actually processed.

We believe that all necessary acts which had to be done within the time limited for the filing of the petition were done. Alternatively, we contend that every reasonable effort toward good faith compliance with the rules was made on behalf of petitioner, and in the event that the court finds that any act which was not perfected until January 2, 1973 should have been perfected by December 26, 1972, that this reply brief be accepted as a Motion to Extend the Time for Petitioning for Certiorari by Seven Days, from December 26, 1972 until January 2, 1973. *Rule* 22(1) permits the court, for good cause shown, to extend the time for applying for a Writ of Certiorari in such cases for a period not exceeding 60 days.

Respectfully submitted,

LEON M. ROBINSON
Counsel for Petitioner
143 East State Street
Trenton, New Jersey 08608
(609) 394-3161

Of Counsel:
WILLIAM L. BOYAN
835 Berkeley Avenue
Trenton, New Jersey 08618
(609) 989-8448

February 1, 1973

Verification

STATE OF NEW JERSEY
County of Mercer ss:

Leon M. Robinson
and
William L. Boyan

BEING of full age on their oaths depose and say:

1. Leon M. Robinson is the attorney of record for petitioner and William L. Boyan is of counsel with petitioner.

2. Both affiants have read the foregoing reply brief. The facts stated therein are true to the best of their knowledge, information and belief.

LEON M. ROBINSON

Sworn to and subscribed
before me this day
of February, 1973

Notary Public of
New Jersey

WILLIAM L. BOYAN

Sworn to and subscribed
before me this day
of February, 1973

Notary Public of
New Jersey

Exhibit "A"

IF YOU PAY BY MAIL
PLEASE RETURN PUNCHED CARD WITH YOUR PAYMENT
IF YOU PAY IN PERSON
PLEASE BRING WITH THIS BILL AND PUNCHED CARD

New Jersey Bell
OFFICE HOURS 8 A.M. TO 5 P.M. MONDAY THROUGH FRIDAY

127 28 609 989 8448

M L BOYAN
PAGE 3

FOR BUSINESS OFFICE DIAL 896-9900

DATE	PLACE CALLED	AREA	TELEPHONE NO.*	AMOUNT
121	WOODBRIDGE NJ	A201	362090	195
121	SOMERVILLE NJ	A201	725 4700	140
121	WOODBRIDGE NJ	F201	636 2030	25
122	OWESTFIELD NJ	A201	654 3100	35
122	IRVINGTON NJ	A201	375 1717	130
122	NEWBRUNSWK NJ	A201	846 2500	140
122	PHILA PA	A215	725 9300	00
122	SOMERVILLE NJ	M201	722 0044	05
122	SOMERVILLE NJ	A201	722 0005	140
122	WASHINGTON DC	A202	331 1640	75
122	SOMERVILLE NJ	F201	722 0044	05
122	PHILA PA	F215	546 4018	327
122	SOMERVILLE NJ	A201	722 0044	00
122	OEAL NJ	A201	313 3300	05

JAN 01 73

Service and Equipment — *For one month in advance*	
Message Units — *For one month* ( )	
Calls Outside Local Area and Telegrams	75
Other Charges or Credits — *Explanation enclosed*	05
Federal Excise Tax	327
Directory Advertising	00
Business Free Local Bill — *Detail attached*	05
PLEASE PAY THIS AMOUNT ⟶	
TOTAL	1203

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